IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 86 OF 2005

1. Mr. Jaidev Yeshwant Naik,
   Son of Yeshwant Naik, major in age,
   Businessman, Indian National, residing
   at Carmibhat, Murda, Merces, Goa.

2. Mr. Chandru Laxman Naik,
   Govekar, son of Laxman Govekar,
   Married, major in age, Indian National,
   Residing at H.No.166,
   Carmibhat, Murda, Merces, Goa ..... Petitioners.

V/s.

1. Smt. Prabhavati Pundalik Uskaikar,
   Wife of Pudalik Uskaikar, major
   In age, residing at Carmibhat,
   Murda, Merces, Ilhas, Goa.

2. Mr. Pundalik K. Uskaikar,
   Major in age, businessman,
   Residing at Carmibhat,
   Murda, Merces, Ilhas, Goa. ..... Respondents.

Mr. J.P. Mulgaonkar, Advocate for the petitioners.

Mr. S.D. Lotlikar, Sr. Advocate with Mr. R.S. Sardessai, Advocate for the respondents.

CORAM : A.P. LAVANDE, J.

DATE : MARCH 3, 2005.

ORAL JUDGMENT :

Rule. The learned Counsel for the respondents waives notice. By consent of the learned Counsel appearing for the parties, heard forthwith.

2. By this petition, the petitioner takes exception to the Order dated 18.2.2005 passed by the IInd Adhoc Additional District Judge, Panaji in Misc. Civil Appeal No.92/2004. The petitioners are the original plaintiffs in Regular Civil Suit No.116/04/B, pending before the Civil Judge, Senior Division, Panaji and the respondents are the original defendants. The parties shall be, hereinafter, referred to as the plaintiffs and the defendants, respectively.

3. Along with the said suit, the plaintiffs filed an application seeking interim relief bearing Civil Misc. Application No.294/04/B. After hearing both sides, the learned Civil Judge, Sr. Division, Panaji by order dated 14.12.2004, confirmed the ad interim order passed on 10.4.2004 and granted injunction restraining the defendants from doing any further construction in the set back area of 3 metres from the boundaries of the suit property. Against this order, the defendants preferred an appeal which was made over to the Adhoc Additional District Judge, Panaji, who after hearing the parties, passed the impugned order allowing the appeal partly, by modifying the order passed by the trial Court. The operative part of the order reads as follows :

> "Appeal of the appellants is partly allowed. The order of the lower Court is modified to the extent that the appellants are permitted to do the construction of their residential house till the level of ground floor only.".

4. Aggrieved by the impugned Order passed by the learned lower appellate Court, the plaintiffs have filed the present petition. Mr. Mulgaonkar, learning Counsel appearing for the petitioners has submitted that the lower appellate Court has not exercised the jurisdiction in accordance with law. The learned Counsel further submitted that the lower appellate Court has neither dealt with the pleadings of the parties nor with the reasonings given by the trial Court while passing the impugned Order. Mr. Mulgaonkar further submitted that the appellate Court while modifying the order passed by the trial Court ought to have given the reasons as to why it found the reasons given by the trial Court untenable in law. Mr. Mulgaonkar has placed reliance on the following two Judgments of the Apex Court : ***Wander Ltd. and another vs. Antox India P. Ltd.*** (1990 (Supp) SCC 727); and ***Sree Jain Swetambar Terapanthi Vid (S) vs. Phundan Singh and ors.*** ((1992) 2 SCC 377). Placing reliance on the two Judgments of the Apex Court, Mr. Mulgaonkar has submitted that the lower appellate Court has exercised the jurisdiction contrary to the principles laid down by the Apex Court in the said two Judgments and on this count only, the

impugned Order is liable to be set aside.

5. Per contra, Mr. Lotlikar, learned Senior Counsel appearing for the respondents has vehemently supported the impugned order and has submitted that the lower appellate Court has passed the impugned order after considering the equities and merits, and as such, no fault could be found with the order. Mr. Lotlikar has submitted that although the impugned Order has not been passed strictly in terms of the principles laid down by the Apex Court, but that is not the ground on which this Court should set aside the impugned order in exercise of writ jurisdiction. According to Shri Lotlikar, no interference is called for against the impugned order in exercise of writ jurisdiction.

6. I have gone through the records. I have considered the submissions made by the learned Counsel for the parties and I have also gone through the Judgments relied upon by the learned Counsel appearing for the petitioners.

7. A bare perusal of the impugned Order discloses that the lower appellate Court has not discussed the respective cases set out by both the parties. The lower appellate Court has also not given reasons as to why it disagrees with the findings given by the trial Court. In the case of ***Wander Ltd. and another vs. Antox India P. Ltd., (supra)*** the Apex

Court in paragraph 14 has observed thus :

> "The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that covert was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph : (SCR 721)
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> > "... These principles are well established, but as has been observed by Viscount Simon in

> Charles Osenton & Co. v. Jhanaton `the law as to the reversal by a court of appeal of an order made by a judge below in exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."
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> The appellate judgment does not seem to defer to this principle."

In ***Sree Jain Swetambar Terapanthi Vid (S) vs. Phundan Singh and ors. (supra),*** the Apex Court has observed in paragraph 12, as under :

> " It may be pointed out that it is one thing to conclude that the trial court has not recorded its prima facie satisfaction on merits but granted the temporary injunction and it is another thing to hold that the trial court has gone wrong in recording the prima facie satisfaction and setting aside that finding on the basis of the material on record because it has not considered the relevant material or because it has erroneously reached the finding or conclusions on the facts established. In the first situation, the appellate court will be justified in upsetting the order under appeal even without going into the merits of the case but in the second eventuality, it cannot set aside the impugned order without discussing the material on record and recording a contrary finding. The High Court proceeded to set aside the order of the trial court on the first ground ignoring the aforementioned

findings of the trial court. The order under appeal is, therefore, unsustainable."

8. In the present case, the lower appellate Court has partly set aside the Order passed by the trial Court and, therefore, in the light of the principles laid down by the Apex Court, it was necessary for the lower appellate Court to give reasons as to why it was not agreeing with the findings given by the trial Court before partly allowing the appeal. The lower appellate Court has not done this exercise while passing the impugned order. As stated by the Apex Court in ***Wander Ltd. and another vs. Antox India P. Ltd., (supra),*** an appeal against order granting or refusing injunction, is an appeal against exercise of discretion. The lower appellate Court has passed the impugned order without following the principles laid down by the Apex Court in the above referred two Judgments. I am unable to accept the submission of Mr. Lotlikar, learned Senior Advocate appearing for the respondent that the impugned order is passed in accordance with the law. I am also unable to accept the submission of learned Senior Counsel that since the impugned order is justified on merits, this Court should not exercise the jurisdiction under Article 227 against the impugned order.

9. It is well settled that jurisdiction under Article 227 can be invoked to see that the subordinate Courts exercise jurisdiction in accordance with law. In my opinion, it will not be a proper exercise of

jurisdiction by this Court to appreciate the merits of the case in the writ petition filed by the petitioners against an order passed by the lower appellate Court, reversing order of injunction passed in their favour. Whether the trial Court has passed correct order keeping in mind the settled legal principles governing the grant of injunction, is for the appellate Court to see and in my opinion, this Court will not be justified in exercise of jurisdiction under Article 227 to reappreciate the material and come to the finding as to whether the trial Court is right or as to whether the appellate Court is right on merits when the appellate Court does not give reason for setting aside the order. I am, therefore, unable to accept the submission of the learned Senior Counsel that the impugned Order is to be maintained since it can be justified on merits. In my view, the only course open in the present matter is to set aside the impugned Order and remand the matter back to the lower appellate Court to decide the Misc. Civil Appeal No.92/04 in accordance with the well settled principles which have been mentioned hereinabove.

10. In the result, therefore, the petition is partly allowed. The impugned Order dated 18.2.2005, passed by the lower appellate Court is quashed and set aside and the matter remanded back to the IInd Additional District Judge, Panaji with a direction to decide the appeal in the light of the observations made hereinabove. It is made clear that I have not given any findings on merits and the lower appellate Court

shall decide the matter on its own merits, after hearing both sides.

11. At this stage, Mr. Lotlikar has submitted that having regard to the fact that the impugned order is being set aside, the lower appellate Court be directed to decide the appeal expeditiously. Mr. Mulgaonkar has no objection if such a direction is given. Accordingly, the lower appellate Court is directed to decide Misc. Civil Appeal No.92/2004 expeditiously and in any case before 31st March, 2005. The parties to appear before the lower Appellate Court for appropriate directions on 7.3.2005 at 10.30 a.m. Writ Petition is disposed of in the aforesaid terms.

A.P. LAVANDE, J.

ssm.